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&c.

BY C. FANE, ESQ.

ONE OF THE COMMISSIONERS OF HER MAJESTY'S

COURT OF BANKRUPTCY.

[*Price One Shilling.*]

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BANKRUPTCY REFORM:

IN A

SERIES OF LETTERS

ADDRESSED TO

SIR ROBERT PEEL, BART.

BY

C. FANE, ESQ.,

ONE OF THE COMMISSIONERS OF HER MAJESTY'S
COURT OF BANKRUPTCY.

LETTERS I. II. III.

Ne quid falsum audeas, ne quid verum non audeas.

LONDON:
S. SWEET, 1, CHANCERY LANE, FLEET STREET,
Law Bookseller & Publisher.

1838.

PREFACE.

THE Bankrupt Law, and the tribunals by which it has been administered, have been denounced by the highest authorities in every age. In 1801, Lord Eldon publicly, from his judgment-seat, declared* that "the abuse of the Bankrupt Law was *a disgrace to the country;*" and he added, that, "unless the Court held a strong hand over bankruptcy, *particularly as administered in the country,* it was itself accessary to as great a *nuisance* as any known in the land, and known to pass under the forms of its law." In 1831, the present Lord Chancellor, then Mr. Pepys, said in his place in Parliament†, "Ever since I have been acquainted with the profession, I have uniformly heard two great evils complained of, as connected with the Court of Chancery; the one was, the existing state of the Bankrupt Law, the other, the mode of its administration." An effort to reform the system was then in progress, and the creation of the present Court of Bankruptcy was the result. It was, however, publicly declared that the measure then carried was to be but the *commencement* of reform; and to make the pledge more distinct, there was inserted in the King's speech the following passage: "I have observed, with no less pleasure, the *commencement* of important improvements in the Law of Bankruptcy, from which the most beneficial effects may be expected *."

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* Vesey's Rep. in Chan. 6th Vol. pp. 1, 2.

† Mirror of Parliament, 13th Oct. 1831, p. 3038.

Six years have since elapsed, reform continuing in the ascendant, and not only has the pledge, implied in the word "commencement," not been redeemed, not only has *nothing more* been done, but much, that appeared to have been done, has been undone. The New Court has been degraded, so far as the public denial of all professional rank to its members can degrade any court; its powers have been diminished, and its jurisdiction narrowed; and it is greatly to be feared that the same mischievous policy will still pervade all Government measures relating to it, for, even within the present year, it has been proposed, by the Bill for the abolition of Imprisonment for Debt, to impose upon the Commissioners of the Court inferior duties, of a character not judicial, and to give them an additional remuneration, such as was never before offered to a judicial servant of the Crown, namely, *what the Lord Chancellor may order!!!*

---

* Mirror of Parliament, 20th Oct. 1831, p. 3143.

Presuming on an experience of sixteen years, first, as a Commissioner of Bankrupts under the late system, and afterwards as a Commissioner of the New Court, and in the hope of contributing something towards giving a right direction to the course of Bankruptcy Reform, the writer has prepared for publication a series of letters, of which the three now published form the commencement; in which he will endeavour to point out the evils of the existing system, trace them to their source, and suggest such plan of reform as will, in his judgment, remedy those evils. The plan, he will ultimately propose, will include the following, as its leading principles:—

1. The establishment of competent *Courts*, both in town and country, having *exclusive* jurisdiction in matters of bankruptcy, and armed, not only with all ordinary powers, but with more than ordinary powers.

2. The giving to those Courts an exclusive jurisdiction—1st, as to the question of the bankruptcy; 2ndly, as to all claims made by persons to property found in the bankrupt's possession, and seized as belonging to his estate; and, 3rdly, as to all questions arising between the different creditors, or classes of creditors.

3. The appointment, in every case, of a commercial agent, or official assignee, as an officer of the Court, to perform all duties, which are in their nature commercial, or involve matters of account, leaving matters involving law to the management of the solicitor.

4. The securing the choice of *honest* assignees, by limiting the right of voting for them to those creditors *only*, whose debts are above suspicion, being evidenced by regular entries, made in a business-like manner. This would put an end to fictitious proofs.

5. The substitution of a well-arranged scale of rewards and punishments, in place of the present certificate, which is given or withheld at the caprice of creditors, influenced by any and every motive but a love of justice; the highest reward to be the reinstating an honest insolvent, with the consent of the majority of his undoubted creditors, in the possession of his stock in trade and other property, all demands against him being moderated to so many shillings in the pound, as his assets, sold in the ordinary course of business, would enable him to pay; the severest punishment being hard labour, or even transportation.

6. The introduction of a good system of bankruptcy statistics, printed forms being approved and adopted by the Court, in which the facts furnished by each bankruptcy might be placed by the official assignee or commercial agent, having the superintendence of that bankruptcy, in a tabular form, for the information of the public.

And, lastly, the appointment of all or some of the members of the Court of Bankruptcy Commissioners under a standing commission, requiring them annually to report to Parliament, whether any and what improvement could be made in the then subsisting system.

It has been proposed to Parliament to abolish imprisonment for *debt,* and substitute imprisonment for *fraud.* The policy of this may well be doubted: the practical result will probably be, that there will be no imprisonment at all. At present a debtor, who does not pay, finds himself in the grasp of the law, and he approaches the law as a suitor, praying to be relieved from a painful position, in which he has voluntarily placed himself; and the law not unreasonably requires, as a condition of its interference, that he should make such full and candid disclosures as will shew that he is not undeserving of indulgence and relief; and if he does not make out a good case, the law leaves him where it found him, till it thinks he has suffered sufficiently. The moment imprisonment *for debt* ceases, the position of the debtor will be reversed: instead of being a suppliant for relief, and bound to make out his own case, he will be entitled to stand on his defence, and hold the law at arm's length; he will say, "you charge me with a crime, *prove* it: it is a first principle in the law of England, that a criminal shall not be compelled to give answers which may tend to criminate himself;" and the practical result will probably be that which I have above pointed out, namely, no imprisonment at all. Certain it is, that, notwithstanding the countless frauds practised in bankruptcy, the parties are scarcely ever punished, or even prosecuted.

Would it not be better to retain imprisonment for debt, both on mesne process and in execution, and use them, first, as a test of insolvency; and, secondly, as an easy means of inflicting punishment where punishment was deserved? The objection to imprisonment for debt *on mesne process* is, that the creditor can imprison his debtor *even where the right is doubtful,* upon a mere affidavit. The obvious remedy for this would be to provide that no debtor should be arrested except upon an order made by a Commissioner of the Court of Bankruptcy, or the corresponding authority in the country, and that no such order should be made except upon a statement of the account, if any, giving dates, names, and items, and shewing the balance, verified by affidavit; nor unless the creditor attended in person with his books, to submit to a cross-examination by the Commissioner; nor unless, upon the case made, it appeared highly probable that the debt was due, and that the debtor had no substantial defence. This is the course daily pursued, when a creditor seeks a declaration of his debtor's bankruptcy instead of an arrest, and it occasions no inconvenience.

The objection to imprisonment *in execution* is, that the imprisonment may be perpetual, yet ineffective. The obvious remedy for this would be, to enact that the lying in prison three weeks without payment should constitute insolvency, and that the debtor should become subject to the law of bankruptcy.

These two provisions, together with one enabling every debtor to declare his own inability to pay in full, surrender his assets, and pray a suspension of all legal process, pending a general enquiry into the causes of his insolvency, would probably obviate all the mischiefs of the present law of imprisonment; and imprisonment for debt might then be retained, first, as a test of insolvency in those cases, where the debtor pretended that he did not pay, because he had a defence, when the truth was, he did not pay because he *could not*; and, secondly, as an easy means of inflicting punishment where punishment was due.

The following letters are addressed to Sir Robert Peel; because the writer feels, that, if he should succeed in attracting the attention of that eminent Statesman and sincere law reformer, to the monstrous state of the present bankrupt law, every other object would necessarily follow.

A LETTER,

&c.

SIR,

FROM the earliest times the Bankrupt Law and its results have been the subjects of loud and universal complaint; nor is this surprising; for, as the law itself is a mass of absurdity and injustice, it would be strange indeed if its results had been otherwise than unsatisfactory. The Lord Chancellor has lately announced his intention of bringing forward some measure of Bankruptcy Reform without delay, and has issued a circular, addressed to the members of the Court of Bankruptcy, requesting suggestions. That circular reached me, amongst others; and as I have ever been deeply desirous of promoting, to the utmost of my power, every real and practical reform, and more especially reform in that part of the law with which my office connects me, I at once resolved to contribute my mite to the attainment of the excellent object now publicly professed by the Head of the law.

Anxious, however, as I was to promote the object, and indeed fully sensible, that it was my bounden duty to do so to the utmost of my ability, I could not prevail with myself to adopt the method, apparently contemplated by his Lordship, that of sending a *private* communication in answer to a *private* request. Such method is in itself unsatisfactory. Bankruptcy Reform is matter of public concern, and if it be necessary, that information should be furnished by those who, through their public situations, have had the means of acquiring it, to those on whom, constitutionally, the duty of amending what is amiss devolves—that information should be demanded in the tone of authority, either through a Parliamentary Committee or a Royal Commission; it should be given, not as matter of courtesy, but as matter of duty; and it should be given publicly, and acquire that notoriety, which publication by authority gives. A public servant, called upon to collect his scattered thoughts, and to methodize and embody them in writing, and who feels himself so impelled by a sense of duty, that he cannot resist the call or decline the task, has at least a right to feel sure, that his labours shall not be wholly thrown away; to feel sure, that the suggestions which he has prepared, and perhaps with great labour condensed, that they may not be too voluminous for the careful perusal of one already burthened with business beyond what any human strength can bear, shall not be laid aside unread or undigested: but what security is there for this, if the communication be private? What probability is there, that any Lord Chancellor could find time to bestow even a cursory perusal upon manuscripts thus prepared, still less to digest them, or extract from them the materials of a public measure?

But if this objection had not existed, I should still have been averse to the method of private communication, for a reason which I feel myself bound to state and to justify, though I approach it with the utmost reluctance and hesitation; and it is this, —that I cannot divest my mind of a belief, impressed upon it by events, that it would be vain to lay before the present Head of the law any scheme of reform, based upon the great principles of Lord Brougham's plan.

When Lord Brougham first opened that plan in the House of Lords, he distinctly explained his general views, and pointed out the course he meditated: he admitted, that there was as much of error in the Bankrupt Law itself, as there was in the system by which it was administered; but he said, "I cannot do every thing at once; I cannot, in the same session, create a new establishment to administer the law, and a new law for that establishment to administer; I must do one thing at a time; and, of the two, I prefer commencing with the creation of a new and competent Court: when we have got that, we shall be in a better situation to take *another step in advance*; first, because, in the members of the new establishment, we shall have persons, to whom we may apply, with confidence, both for information in the nature of sta-

“ tistics, and suggestions, which their experience must
“ enable them to furnish; and, secondly, because, if
“ hereafter it shall be thought advisable to amend
“ the system, by giving a more extended, or even an
“ *exclusive* jurisdiction to the new Court, we shall
“ have persons, to whom we can entrust it, *with the*
“ *confidence of the commercial world.* My first mea-
“ sure, therefore, shall be to establish a new Court;
“ but I will proceed cautiously, and therefore I will
“ establish my new machinery in the first instance in
“ the metropolis only; and having effected that, I
“ will pause and look round. The Court, however,
“ which I intend to establish, must be an *effective*
“ one; it must therefore contain within it the essen-
“ tials of every good system; there must be pri-
“ mary and appellate tribunals, and men of capacity
“ and knowledge to preside in them; and each
“ tribunal must be armed with all those powers,
“ *which, as appears by the practice of all nations,*
“ *have ever been deemed the inseparable accompa-*
“ *niments of a Court of Justice.* In the present
“ temper of the times, and burthened, as the funds
“ will be, with retiring pensions, I am compelled to
“ be economical in my salaries. The situations how-
“ ever, which I propose to establish, will, I hope, be
“ attractive to the Profession, because, though I
“ cannot give high salaries, I can attach to the
“ offices the character of permanence; I can place
“ the Court itself high in the judicial establishments
“ of the country; I can give to the individual holders

" a high professional rank; and I can hold out to " the junior members prospects of promotion: and " holding out these additional allurements in aid of " the salaries I can afford, I trust I shall be able to " attract from the bar such men as will be able to " render good service to the country." Such was the outline of his Lordship's plan, as evidenced by his speeches in Parliament; and of the practical soundness of its principles no reasonable man can entertain a doubt.

Scarcely however had he commenced the task of creating what he had conceived, before he found that he had to contend with the prejudices of a powerful profession; prejudices, just as strong in those of the profession who called themselves liberals, as in those who professed opposite politics. However, he persisted: his measure, authorizing the creation of a new Court of Bankruptcy, became a law; and the King's letters patent issued, creating the Court.

The Court having been thus created, the author of the measure thought, and was justified in thinking, that he had at least succeeded in *two great objects:* the one, the placing the primary jurisdiction in Bankruptcy under the superintendence of *Courts,* instead of that species of nondescript, without either power or dignity, which has ever been the fertile source of all that disfigures and disgraces the Bankrupt Law—*Lists of Commissioners;* the other, the giving to the new Court a proper station amongst the judicial establishments of the country, by assigning to it and to its members a high professional rank and precedence. He was justified in thinking that he had created *Courts,* when he read the emphatic language of his own act, the act of 1831:—" And the said Court (of Bankrupt-" cy) shall be and constitute a Court of Law and " Equity, and shall, *together with every Judge and* " *Commissioner thereof,* have, use, and exercise all " the rights, incidents, and privileges of a Court of " Record, or Judge of a Court of Record, and all " other rights, incidents, and privileges, as fully, to " all intents and purposes, as the same are used, " exercised, and enjoyed by any of his Majesty's " Courts of Law or Judges at Westminster." He was justified in thinking that he had secured to the new Functionaries a becoming rank and precedence, when he read the following language in the letters patent, by which the Court was created:—" And we " do further give and grant to the said Judges and " Commissioners rank and precedence in all our " Courts of Law and Equity in manner following; " that is to say, to the Chief Judge of the said " Court, for the time being, rank and precedence " next after the Puisne Judges of our Courts of " King's Bench, Common Pleas, and Exchequer for " the time being respectively, and to the other " Judges of the said Court of Bankruptcy, for the " time being, rank and precedence next after our " said Chief Judge of the said Court for the time " being, and to the Commissioners of the said Court, " for the time being, rank and precedence next

" after our said other Judges of the said Court for " the time being."

He had soon, however, to witness the triumph of professional prejudice, and, what Jeremy Bentham calls, judge-made law, over the Crown and over Parliament; for it was quickly decided, in defiance of the Crown, by all the Law Societies, that the King's letters patent, so far as concerned professional rank, should be disregarded within their circles, and that no member of the Court should receive, *as such,* the slightest distinction amongst them; and it was soon after decided by the Court of Exchequer, that the administration of justice in Bankruptcy, so far as concerned the really useful Courts, those of the Commissioners, should remain, as before, under the old species of unintelligible jurisdiction, which may well be called nondescript; for, as it is not a Court, the English language does not even furnish an expression, wherewith to describe it.

Had the law officers of the Crown been imbued with the real spirit of reform, had they felt strongly what Lord Brougham had felt strongly, that, to make the new institution an efficient instrument to promote the public welfare, it was essential that it should be both respectable and respected, they would surely, under such circumstances, have instantly interfered. Addressing themselves to the Crown, they would have advised such steps to

be taken, as would have ensured to the new Functionaries the practical recognition, amongst their brethren of the profession, of the rank thus publicly bestowed, and would never have submitted to have the King's letters patent treated as a dead letter; addressing themselves to the legislature, they would have reminded it of the opinion given by the Committee, which, after continuing its labours during two sessions, reported on the Bankrupt Laws in 1818:—" That it was essen-
" tial to the due administration of the (Bankrupt)
" Law by the Commissioners, that they should sit
" *as Judges*, each list constituting a Court of Jus-
" tice, with full power to enforce order, and com-
" mit for contempt of their meetings;" and they would have asked, whether the strong enactment of the law of 1831, above quoted, was or was not intended to carry out that recommendation; and, had the answer been affirmative, they would have called for a new enactment, which neither the Court of Exchequer nor any other Court could have misunderstood. No such course, however, was pursued, but the new Institution was left to its fate, to struggle on under every discouragement.

It is not however alone from the silent acquiescence of the Head of the law, and of the law officers of the Crown in the forced constructions thus put upon the Court of Bankruptcy Act and the King's letters patent,—constructions utterly subversive of the principles, upon which Lord Brougham's plan of reform was based, and which never could have been arrived at, but by assuming, in violation of one of the first axioms of legal construction, that the words of an Act of Parliament, or of letters patent, *might mean nothing* (*! !*)—that I have drawn my present conclusion, as to the feeling, with which the progress of Bankruptcy Reform is regarded: many other circumstances have occurred to fortify that conclusion; two within a short period: the first of considerable importance; the other, it is true, unimportant enough in itself, yet not without weight as an index to feeling.

It has ever been considered, that, bad as the Bankruptcy jurisdiction was, even in London, under the former system, it was infinitely better than the corresponding jurisdictions in the *country;* and hence, when Lord Eldon, upon taking his seat as Chancellor, in 1801, pronounced his celebrated philippic against the system, he selected *country* commissions as the principal subjects of his denunciations. Of the witnesses, who were examined before the Select Committee on the Bankrupt Laws, which sat in 1817 and 1818, many went the length of proposing, as a measure of reform, the placing the whole country under the jurisdiction of the London tribunals; and in 1831, when Lord Lyndhurst spoke in opposition to Lord Brougham's plan of reform, he observed, " that it had been always the object of Lord Eldon, when Chancellor, to transfer, when he could do so with propriety, the proceedings of a Bankruptcy from a *country* commission to one in town;" and he added, that, " from his own observation, he was satisfied, that cases of abuse were confined, almost entirely, to *country* commissions." Yet, notwithstanding this obvious truth, thus confirmed by two successive Chancellors, and notwithstanding the admitted improvement, which has since taken place in the London tribunals, an order has lately been made, which, by occasioning additional expense and difficulty in bringing a country bankruptcy to London, has narrowed the jurisdiction of the reformed in favour of the unreformed tribunals.

The other circumstance is this,—that, when the members of the new Court of Bankruptcy were invited by the Earl Marshal to assist, with the other judicial functionaries of the Crown, at the interment of his late Majesty, and were of course assigned that place in the ceremonial, which was given them by the Act of Parliament and the letters patent of the Crown, the Attorney and Solicitor-General officially protested against it, accompanying their protest with this most extraordinary (! !) suggestion,—that the members of the new Court had " no official rank whatever!"*

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* The servants of the *Crown* insisting that the letters patent of the *Crown* mean *nothing*, presents at least a curious anomaly, and the more so, because the Attorney and Solicitor-General themselves claim their precedence under instruments of inferior authority to Letters Patent, viz. *warrants*.

After reflecting fully, and without I am sure being influenced by personal feelings, upon the above circumstances, I cannot resist the impression, that it would be vain to lay before the present Head of the law any scheme of reform, which should be based upon the great principle, that litigation arising out of Bankruptcy was as fit a subject for the jurisdiction of *Courts*, expressly appropriated to that purpose, as any other subject, on which men differ, or to propose any scheme, which would militate against those deep-seated professional prejudices, which have arisen in connection with an erroneous system, commencing with the Tudors, and continued to the present day. He, indeed, who would seek to establish new principles in legislation, must seek for converts elsewhere than amongst the professors of the law; and even so also must he, who seeks no higher object than mine, the application of old and acknowledged principles in opposition to the prejudices of habit.

Impressed with these convictions, and actuated, I trust, by no other influence than the true spirit of reform, I turn from those from whom, I fear, little or nothing can reasonably be expected, to yourself, as being that Statesman of the day, from whom the cause of rational, useful, and *practical* Reform has most to hope; and I entreat your attention, whilst I endeavour to lay before you the monstrous principles, and no less monstrous mischiefs, of the present system of

Bankrupt Law, and to suggest to you suitable remedies. These matters, however, I must reserve for future letters; and in the meanwhile I beg to subscribe myself,

With great respect,

Your obedient Servant,

C. FANE.

The Right Honorable
Sir Robert Peel, Baronet.

LETTER II.

Sir,

IN my last Letter I stated to you the object, which I had in view, that of promoting the cause of Bankruptcy Reform; and I detailed to you the reasons, which had induced me to pursue that object, by means of a public appeal, addressed to yourself, rather than by means of a private communication, addressed to the present Head of the law.

I need scarcely observe, that, before determining to adopt such a course, I had severe struggles with myself; for I could not but be sensible that I was about to run counter to a host of prejudices,—to that prejudice, which forbids a judicial functionary from speaking disrespectfully of the system he is appointed to administer,—to that prejudice, which forbids a person so situated from exhibiting publicly any thing which might bear even the semblance of political hostility to the Government,—and to that, which forbids him from advocating reform, otherwise than through the legitimate channel of Parliament, or by private communication with the proper servants of the Executive. But, sensible as I was of what I was about to encounter, I resolved to proceed, irresistibly impelled by those feelings of indignation and disgust, which the daily and hourly witnessing of gross absurdities, monstrous injustice, and ruinous waste, are so well calculated to excite.

In performing the task, which I have thus set myself, it is not my intention to sacrifice truth to flattery, and therefore I will not be deterred, either by the dread of offending, or the fear of being thought to have outstepped the bounds of decency and moderation, from laying before you, at the outset, this startling truth ; a truth, which a ten years' experience under the system lately superseded, and a six years' experience under that which has succeeded it, have indelibly impressed upon my mind ; namely, that the Bankrupt Law is a mass of folly and absurdity from beginning to end ; that it violates every principle of common sense ; that it is the occasion of the grossest injustice, and the most appalling frauds and perjuries ; that, as a whole, it is a disgrace to a civilized community; and that, if it does not produce all the mischiefs, which its monstrous principles would naturally generate, it is because the good sense and good feeling of mankind counteract the absurdities and iniquities of the law. These, Sir, are severe denunciations : whether they are just or not I will leave it to yourself to decide, when you have read the statements which I shall lay before you.

By the law, as it at present stands, insolvency is assumed to be a crime!—The supposed criminal is tried in his absence, on ex parte evidence, and, if the inquiry takes place in the country, he is tried by persons, *not judges,* who have a direct pecuniary interest in condemning him; for, if they acquit him, their fees cease, and if they condemn him, their fees continue, and *may* amount to any sum!—No sooner is he thus condemned, than he is deprived by the law of every farthing he possesses!—If he comes to the judicial functionaries, who have thus condemned and stripped him, and asks upon what grounds they have proceeded, the answer he gets is simply this, "Find out as you can; we won't tell you; if you like you may bring an action; and the answer to that action will tell you!"—The creditor, who has proceeded against him, who, if an injured, is at least *not* a ruined man, is admitted to proceed before a jurisdiction, where the expenses are comparatively trifling; the debtor, ruined by the process, stripped as I have said, of every farthing he possesses, must seek redress, if at all, in the more expensive courts!—and although the proceedings are, up to this point, thus unjust and *inconclusive,* strange to say, the law treats them as though they were both just and *conclusive;* for, besides sanctioning the seizure of the debtor's property, it authorizes the publishing his bankruptcy in the Gazette, and enacts, that if he does not, within a certain short period, come in and surrender, and sign and subscribe his surrender, and submit to be examined as to his affairs, he shall be deemed to be guilty of a capital felony, and, if convicted, shall be liable to be transported for life (formerly the punishment was death); and this, even although his non-surrender may have been occasioned by his not knowing that he had been declared bankrupt, or by an accident or illness rendering his surrender physically impossible.

Such, Sir, is the justice, meted out to the bankrupt at the commencement of the proceeding. Here the law, apparently wearied with wronging the bankrupt, seeks other victims, and commences a series of wrongs against every other party concerned, on the principle, as it may be presumed, that, as two negatives make an affirmative, so a wrong done to one side, met by a wrong done to the other, will together constitute justice to both.

But here, Sir, I will pause, and will reserve for my next Letter a picture of those wrongs, which, by means of the rule of contraries, are to nullify the wrongs already laid before you.

I am, &c.

C. FANE.

LETTER III.

SIR,

IN my last letter, I laid before you the wrongs which the law inflicted on the Bankrupt. In this, I propose to give you an outline of those, which it inflicts on the Commissioner, the Messenger, the Official Assignee, the Creditors' Assignees, and the Creditors themselves. The wrongs I have already detailed are the natural consequences of carrying out the assumption, that the adjudication, though made on hearing one side only, was clearly right. The wrongs I am about to point out are consequences of a theory exactly the reverse, namely, that the adjudication, being *ex parte*, is not only not clearly right, but is good for nothing: for, upon this supposition, the law permits the bankrupt and every other person to dispute it, and to challenge the assignees or any other antagonist to the proof of its correctness, in any Court in the kingdom, except that in which it was given, and this at any distance of time, even *after* the whole estate has been collected and divided. Hence, if the bankrupt be disposed to be litigious (and certainly the having been condemned behind one's back, without having even been heard in one's defence, is not a circumstance calculated to produce a healthy tone of feeling), he may, though ever so insolvent, harass the servants of the law, or disappoint and delay his creditors, by either bringing or threatening actions to try the validity of the proceedings. If he prefer harassing the servants of the law, and deterring them from doing their duty, he may bring actions of trespass, and sometimes of false imprisonment, either against the commissioners or against their messenger, or against the official assignee. If he prefer delaying and disappointing his creditors, he may attain his object, and in this case not only without expense, but without even the risk of it, by intimating to the assignees that he disputes his bankruptcy, and bidding them proceed at their peril: for then, unless his assignees are men of a different stamp from the rest of mankind,—men who are willing to sow that others may reap—to run *exclusive* risks in order to derive only a *partial* benefit, in which perhaps their share may be trifling—men, who will prefer the performance of their duty to others to the protection of their own interests, (and, whatever flatterers may tell us, such men are oftener sought than found), he will effectually attain his end; for even the most honest assignee may, under such circumstances, justly decline dividing the property which he has collected, lest he should be called upon to refund after the funds have been dispersed; and the dishonest will hail the threats with delight, as furnishing them with a plausible excuse for retaining in their hands funds, the use of which may be so convenient: and that dishonest assignees exist, we need not doubt, when we read the account given by Mr. Vesey of what fell from Lord Eldon, when he first took his seat as Chancellor, in 1801*:—" The Lord Chan-" cellor took the first occasion of expressing " strong indignation at the frauds committed un-" der cover of the Bankrupt Laws, and his deter-" mination to repress such practices. Upon this " subject his Lordship observed with warmth, that " the abuse of the Bankrupt Law is a disgrace to " the country, and it would be better at once to re-" peal all the statutes, than to suffer them to be ap-" plied to such purposes. There is no mercy to the " estate. Nothing is less thought of than the object " of the commission. As they are frequently con-" ducted in the *country*, they are little more than " stock in trade for the commissioners, the assignees, " and the solicitor. Instead of solicitors attending " to their duty as ministers of the Court, for they " are so, commissions of bankruptcy are treated as " matters of traffic; A. taking out the commission, " B. and C. to be his commissioners. They are con-" sidered as stock in trade, and calculations are made " how many commissions can be brought into the " partnership. Unless the Court holds a strong hand

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* 6 Vesey's Rep. in Chan. 1.

" over bankruptcy, *particularly as administered in* " *the country*, it is itself accessary to as great a nui- " sance as any known in the land, and known to " pass under the forms of its law."

And here, Sir, you will naturally exclaim— "What! is it possible that the law can be so unreasonable, as to require an assignee to proceed to distribute the funds amongst the creditors, whilst the question of the bankruptcy remains undecided? Surely the law must furnish to an assignee some method of proceeding, by which he may establish the bankruptcy definitively, before he is called upon to part with the funds!" Strange, however, as it may appear, the law furnishes none; and yet it requires all parties, the commissioner, the messenger, the official assignee, and the creditors' assignees, to proceed just as if the ground they were treading on was perfectly safe. Indeed, it not unfrequently happens, that the bankrupt himself gets up the bankruptcy, or for a time acquiesces in it, and then, on something occurring which does not exactly meet his views, he turns round upon his assignees, and challenges them to prove it; and in such case the proof is doubly difficult, and sometimes impossible, the evidence being within the power or under the influence of the bankrupt; and thus the law is used as a means of fraud, if all goes well, and as a source of embarrassment, if the fraudulent object seems likely to fail.

The system would have been inconsistent, and the picture incomplete and out of keeping, had it not been that the law exhibits as much of injustice and absurdity in its method of concluding the business, as it does in its mode of commencing and conducting it.

Reason would prescribe, that, from the moment of the bankruptcy, all civil, as contradistinguished from criminal, process against the bankrupt should cease; the Bankrupt Law deprives him of every thing he possesses, either in the nature of a present or a future right; and, as the object of all civil process is to produce satisfaction of a pecuniary or civil demand out of property, it seems to follow, as of course, that, when all property is gone, when every thing has been taken from the bankrupt by which he might satisfy his obligations, his obligations should cease; but the law is otherwise, for bankruptcy relieves a bankrupt from no obligations whatever, except such as constitute debts.

Reason would also prescribe, that, at the conclusion of the inquiry, the functionary, who had presided at the investigation, should take an impartial view of the conduct of the bankrupt, as well during that period of struggle, which always precedes the final sinking, as during the administration of his affairs; and should publicly declare his opinion; and that the ultimate fate of the bankrupt should depend rather upon that judgment, than on the uninformed caprice of his creditors. The course, however, is this:—The fate of the bankrupt depends, almost exclusively, upon the caprice of the creditors; the Commissioner neither expresses, nor is expected to express, any opinion as to the general conduct of the bankrupt; and in considering whether he ought or ought not to sign the certificate, he is precluded from taking into his consideration any act, however fraudulent, done by the bankrupt a single day before that on which he became bankrupt.

Such, Sir, is an outline of the present system, and I trust that you will think that the expressions I have used respecting it are not too strong for the occasion. Certain it is, that, in thus condemning it, I am sanctioned by the authority of Lord Eldon, Sir Samuel Romilly, Mr. Montague, and indeed of every person of eminence, who has ever been called upon to express an opinion on the subject; and if any other sanction were wanting, I could seek no better than that which is furnished by the case of Mr. Chambers.

Mr. Chambers was declared bankrupt in 1825: he denied that he had committed any act of bankruptcy, and resisted his commission. From that time to the present, the question whether he is bankrupt or not has been in litigation; and although twelve years have elapsed, and 170,000*l.* have been received by his assignees, the question of his bankruptcy remains undecided, and not one farthing has reached his general creditors. Meanwhile, there has been that wasteful administration of his property, which, without any fault in assignees, is inseparable from such a state of things: thirty thousand pounds (!!!) have been paid to the solicitors to the estate, and other solicitors, who have concurred with them in supporting the commission; between ten and twenty thousand pounds have been the costs of Mr. Chambers; between three and four thousand pounds have been paid to an accountant, and more than one thousand to the official assignee; and thus nearly fifty thousand pounds have been spent, without even ascertaining whether the party be bankrupt. It will scarcely be believed, that the question, upon which fifty thousand pounds have been spent thus fruitlessly, was, whether Mr. Chambers had on some occasion desired a servant to say "not at home" to a creditor when he called. When I last heard of Mr. Chambers, he was in a debtors' prison.

I am, &c.

C. FANE.

LETTER VII.

Sir,

In my two last letters I laid before you, in detail, the evils which result from the present system of commencing, and proceeding with, the administration of a bankrupt's estate, leaving the question of the bankruptcy, that, on which the right of administration depends, *not only undecided, but untried.* That the evils exist, neither is nor can be disputed. What then is the remedy? Must we abandon the convenient practice of proceeding against the bankrupt ex parte in the first instance? A method of proceeding, which is convenient in all cases, and which, in the vast majority, is unattended with either hardship or injustice? I do not see the necessity; the evil consists, not so much in the original proceeding being ex parte, but, *as regards the bankrupt,* in the withholding from him the right of immediately putting the matter in issue in the court where the first proceeding takes place, and of insisting that the petitioning creditor or assignees shall immediately bring forward their case, and their witnesses, THERE, AND IN HIS PRESENCE; and, *as regards the* *assignees and the creditors,* in denying to them the right of prosecuting the effectual enquiry AT ONCE, and compelling them to wait the bankrupt's pleasure. Now, there is a remedy for this evil, so natural, so simple, so obvious, and so consistent with the first principles of justice, and indeed with ordinary practice, that it seems surprising that it should not have been long since proposed and adopted; and it is to pursue the analogy, presented by all courts of justice, which grant what is called interim (or interlocutory) relief. In Chancery, if a plaintiff files a bill for any purpose, and he conceives that he is entitled to an *immediate* interference of the court, by way of extraordinary precaution, he moves for the relief he wants, an injunction, for instance, or the appointment of a receiver, or the payment of money into court, &c.; and, if the case is urgent, he moves *ex parte,* supporting his motion by affidavits; but if he obtain the relief he asks, he is not thereby deprived of his right of proceeding regularly with his cause: he calls for an answer, and if the defendant does not admit his case, he brings the cause to issue, examines his witnesses, and proceeds in the usual way to a decree. Why should not the same plan be adopted in bankruptcy? The first decision in bankruptcy is like the interim order; it is made on hearing one side only, and is made hastily, and on primâ facie evidence, on account of the supposed urgency of the case. Why should not the opposite party have liberty to come in, and either admit or deny his bankruptcy? If he admitted it, as he would do in ninety-nine cases out of a hundred, all question would end at once and for ever; if he denied it, the commissioner would appoint such time, as upon hearing all parties should appear proper, and he would then proceed to hear and determine; the petitioning creditor acting as plaintiff, the alleged bankrupt as defendant. From his determination there would naturally be one appeal, and one only; and it might be provided, that the bankrupt should have a right to insist, if he thought fit, that the question should be tried by a jury upon an issue, and that the Chief Judge of the Court of Bankruptcy should preside. It might also be provided, without even the slightest approach to injustice, that in any action brought by the assignees against third parties, the adjudication should be conclusive evidence that the party was bankrupt on the day *when the bankruptcy was gazetted,* and that the defendant should not be permitted to dispute the bankruptcy, unless the assignees set up a right against him, founded on the notion, that their title as assignees commenced, by what lawyers call "relation to the act of bankruptcy," at an earlier period. By these two simple provisions, nine-tenths of all the evils which now infest the bankrupt law would be obviated.

But it may be said, it is impossible that so simple a remedy as this would be a cure for evils so monstrous, and so inveterate as those in question: let us then test the remedy by imagining it applied to the most monstrous case which has for years disgraced the bankrupt law, the case of Mr. Chambers. Suppose, that Mr. Chambers, upon hearing of his bankruptcy by the arrival of the Messenger, armed with his warrant of seizure, had appeared in court, and by denying his bankruptcy had put the matter in issue, and immediately the commissioners had appointed an early day for hearing and deciding the point; what would have been in issue between the parties ? not the trading, for Mr. Chambers had carried on the business of a banker publicly; not the petitioning creditor's debt, for I believe that was never disputed; but merely, whether Mr. Chambers had or had not ordered a servant to deny him, with intent to delay a creditor. The petitioning creditor, supporting the affirmative, would have produced his witness; the witness would have been subjected to cross-examination in the ordinary way, and then two questions would have arisen for the court; first, did the facts stated amount to an act of bankruptcy, and, if so, was the witness to be believed? How long would the decision have taken ? Twelve years? or twelve months? or twelve hours? or twelve minutes ? Let us then imagine Mr. Chambers, dissatisfied with the first decision, appealing to the Court of Review, and demanding that the question should be tried upon an issue; how long would this second inquiry have lasted ? I should hope neither twelve years, nor twelve months, nor even twelve days. The main question thus decided, every one would have acted with confidence; all proper disclosures would have been enforced, the debts would have been collected, the estates sold, a clear title might have been offered to purchasers, and every thing proceeding smoothly, the creditors would have received their dividends.

And what, I would ask, can be urged against this reasonable proposal? Will it be pretended, that the Commissioner is not fit to preside over this inquiry? He is entrusted by the law to decide that the unfortunate man is bankrupt, and to decide this *on hearing one side only;* will it be contended, that he is less capable of deciding *when he has heard both sides?* Are Commissioners to be classed with the Irish magistrate, who complained, that hearing the defendant had confused a matter previously quite clear? But what is the difficulty? Assuming that the salary of the office, counteracted as it is by the withholding of every collateral professional advantage, is not sufficient to purchase from the bar any very high degree of talent or knowledge, the question still remains, whether any high degree of talent or knowledge is requisite. When moderate talents are devoted to a limited subject, they will produce as great a capacity of dealing with that particular subject, as great talents give of dealing with a greater variety of subjects. The Commissioner may be ignorant on hundreds of important subjects, the knowledge of which could not be dispensed with in a member of one of the great courts at Westminster, and he may, for all that, be as good a Commissioner as the Chancellor himself would be.

But is there any real difficulty in the questions to be considered? None whatever: in nine cases out of ten—perhaps nineteen out of twenty—perhaps ninety-nine out of a hundred—the questions are so simple, that a barrister of three years' standing could scarcely go wrong; and in those that involve the least difficulty, the decisions are so numerous, and withal so accessible, that a commissioner must be indeed unfit for his situation, if he could go far wrong; and, if he did, the injured party might appeal. Certain it is, that the questions which a Commissioner is entrusted to decide, in connection with the proof of debts, are infinitely more difficult than any which ordinarily arise in relation to the main question,—that of the Bankruptcy. Why, then, is he to be trusted with the one, and yet distrusted as to the other.

But let us assume for a moment, that the questions are difficult, and that they are too important to be placed under the jurisdiction of a Commissioner, such as a Commissioner now is, subject though he be to the correction of the Court of Review, is not this assumption a libel on the Government? a libel on the system? Why is the Commissioner unfit to be trusted? Is it because the salary attached to the office is too small to attract into the public service men of sufficient capacity, or sufficient knowledge, to deal with such a subject? If so, does not policy prescribe that the salary should be raised? The pecuniary saving that would result in one such case as that of Mr. Chambers, would pay the extra charge for twenty years, and there would be also an incalculable saving in the amount of human misery. Or is it that the effect of a salary, otherwise sufficient, is so counteracted by the withholding of every collateral advantage, such as professional rank,—the right, or rather the opportunity, of associating with the heads of the profession,—and prospects of promotion,—that its natural effect is marred, and the public comes to be served by men unworthy of trust or confidence? If this be so, the remedy is equally obvious; and there must be a strange want of patriotism somewhere, a lamentable disregard to the interests of justice, if that remedy be not applied!

I trust, Sir, that you will weigh well the suggestion that I have thus laid before you, and that you will not reject it, merely because it implies confidence in functionaries whom it has been for ages the fashion to distrust. All useful reforms are those which result from tracing evils to their source, and applying the remedy *there*. The source of the evil, in this case, was distrust, well or ill-founded; THE REMEDY MUST BE TO MAKE THE REFORMED INSTITUTION WORTHY OF TRUST, AND THEN TO TRUST IT.

I am, &c.

C. FANE.

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